IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1177

AUBREY SCOTT,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Does the Sixth Amendment as applied to the states by the Fourteenth require appointment of counsel in criminal proceedings where the sole penalty imposed is a small fine?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining his defense."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

Ill. Rev. Stat. ch. 110A, § 612(j) (1971):

> "The following civil appeals rules apply to criminal appeals insofar as appropriate:
>
> (j) Contents of briefs: Rule 341."

Ill. Rev. Stat. ch. 110A, § 341(e)(7) (1971):

> "The appellant's brief shall contain the following parts in the order named:
>
> Argument, which shall contain the contentions of the appellant and the reasons thereof, with citation of the authorities and the pages of the record relied on. . . . Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

Supreme Court Rule 23, in pertinent part:

"1. The petition for writ of certiorari shall contain:

(c) The questions presented for review. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court."

Supreme Court Rule 40, in pertinent part:

"1. Briefs . . . shall contain . . .

(d)(1) . . . The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(2) The phrasing of the question presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

STATEMENT OF THE CASE

On January 19, 1971,[1] petitioner Aubrey Scott was apprehended for shoplifting and was charged, pursuant to Illinois Revised Statutes, chapter 38, § 16-1(A)(1), with the theft of an address book and sample case worth $13.68.[2]

On the scheduled day, petitioner appeared in the First Municipal District of the Circuit Court of Cook County for his first court appearance without an attorney. After being informed that he was charged with the offense of theft, petitioner indicated to the Court that he was ready for trial. At the Court's direction, petitioner was then arraigned; after being told that he was charged with theft, petitioner pleaded not guilty, again indicated that he was ready for trial, and waived his right to a jury trial. [A. 6-7].

The People called only one witness to testify, William Bray, the security guard at the Woolworth Store. Bray testified that on January 19, 1971, at approximately 6:00 P.M. he was on duty at the store when he saw petitioner

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1. Although the date of the offense as charged in the complaint and as testified to at trial was January 19, 1971, it is likely that the date of the offense was actually January 19, 1972, since the complaint was filed January 21, 1972 (A. 2) and the first court appearance was scheduled ten days later (A. 3).

2. Illinois Revised Statutes, chapter 38, § 16-1 (1969) contained the following penalty provision: "A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from 1 to 5 years."

approach a sales girl and ask her to unlock an attache case. Bray further testified that he saw petitioner walk around the store with the briefcase for fifteen to twenty minutes, back and forth by the sales girls. During this time, Bray testified that Scott had a $10.00 bill in his hand and had picked up an address book and put it in his pocket. Bray then watched Scott another five minutes, walked out onto the street and observed Scott walk outside of the store with the attache case several moments later. When Scott was stopped, Bray testified that Scott said the attache case belonged to him. Bray testified that the attache case which Scott was apprehended carrying was the property of F. W. Woolworth and had a value of $12.95. [A. 7-8].

Petitioner then testified on his own behalf. He stated that after he had placed his articles in the attache case to see if it was the proper size he walked around the store looking for the salesgirl, but could not find her because of partial blindness. He testified that he was suddenly grabbed by the wrist and accused of shoplifting. He testified that he had money to pay for the briefcase but would not do so after he was accused of theft. [A. 8-9].

After the defendant testified, the People rested their case. (A. 9). The judge indicated that he had a lot of questions, and when the prosecutor stated he felt he had proved his case the judge asked Scott several questions. In response, petitioner testified that he had almost $300.00 in his pocket and was looking for the salesgirl when he was arrested. He further stated that he was arrested inside the store and did not go out on the street. The Court then stated, "I don't believe you, sir. Finding of guilty." [A. 10].

The judge then asked the court sergeant what evidence there was in aggravation, to which the sergeant replied that Scott had been sentenced to the House of Corrections in 1957 for thirty days for petty larceny. The Court then

sentenced petitioner to pay a fine of fifty dollars and no costs. The fine was promptly paid out of the bond deposit. [A. 5].

On February 29, 1972, petitioner filed a timely notice of appeal to the Illionis Appellate Court. On April 27, 1972, petitioner moved in the trial court for the appointment of an attorney as appellate counsel and for a free transcript on the grounds of indigency. Petitioner was thereafter treated as indigent for purposes of review of the trial court proceedings.

In the appellate court petitioner argued that his constitutional and statutory rights to appointed counsel were violated and that the predictive evaluation procedures described in *Argersinger* v. *Hamlin*, 407 U.S. 25, 42 (1972) were unconstitutional. The First District Appellate Court affirmed petitioner's conviction, specifically refusing to extend the rule of *Argersinger* to cases where only a small fine is imposed. (Appendix to petition for certiorari, 13a). The Court also held that Illinois Revised Statutes, chapter 38, § 113-3(b) (1969) did not require appointment of counsel in cases in which only a fine was imposed, and rejected petitioner's claims that predictive pre-trial evaluation was arbitrary and unconstitutional. [Appendix to petition for certiorari, 19a, 15a].

Petitioner then filed for leave to appeal to the Illinois Supreme Court, which granted petitioner leave to appeal. In that court petitioner argued that he had a constitutional and statutory right to appointed counsel. The Illinois Supreme Court found that petitioner was not entitled to appointed counsel under the applicable Illinois statutes or under the rule of *Argersinger*, and refused to extend *Argersinger* to a situation where a conviction resulted in the levying of a fine. [Appendix to petition for certiorari, 3a, 4a].

ARGUMENT

I.

THE SIXTH AMENDMENT DOES NOT REQUIRE APPOINTMENT OF COUNSEL AT STATE EXPENSE IN CRIMINAL PROCEEDINGS IN WHICH THE SOLE PENALTY IMPOSED IS A SMALL FINE.

A.

INTRODUCTION

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) this Court held that the right to counsel provision of the Sixth Amendment was obligatory on the States under the due process requirement of the Fourteenth Amendment. Later, in *Mempa* v. *Rhay*, 389 U.S. 128 at 134 (1967) the Court characterized *Gideon* as establishing "an absolute right to appointment of counsel in felony cases." Nine years after establishing the rule of *Gideon*, however, this Court in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) refused to apply the same absolute rule to non-felony cases.[3] Instead, it

3. The term "non-felony" cases as used herein includes all misdemeanors and petty offenses punishable by imprisonment of any duration. *Argersinger* v. Hamlin, 407 at 37, made it clear that imprisonment without counsel was impermissible regardless of the classification of the offense. In reality, however, actual loss of liberty triggers the requirement of counsel only in non-felony cases, since appointment of counsel is required in all offenses classified as "felonies." *Mempa* v. *Rhay, supra.*

In *Argersinger*, the offense involved was characterized as "petty," *i.e.* punishable by imprisonment of less than six months. In January, 1972, all criminal offenses in Illinois were classified as felonies or misdemeanors. A misdemeanor was defined as "any offense other than a felony", Ill. Rev. Stats., ch. 38, § 2-11 (1969) and was punishable

(Footnote continued on next page)

focused on the consequences of non-felony convictions and prohibited the imposition of any sentence of imprisonment after conviction of an indigent defendant who did not have counsel. In this case since no imprisonment was actually imposed, appointment of counsel was not required by the rule of *Argersinger*. Petitioner argues, however, that the Sixth Amendment should be read to require appointment of counsel in all criminal proceedings in which a jail sentence is an authorized penalty regardless of whether jail time is in fact imposed. Respondent submits that imposition of a small fine is not a deprivation of sufficient magnitude to require appointment of counsel in light of the tremendous burden which such a requirement would impose on the States.

B.

Actual Loss Of Liberty Should Define The Boundaries Of The Right To Counsel In Non-Felony Cases.

1. Not All Crimial Actions Are Subject To The Sixth Amendment Right To Counsel Provision.

The right to counsel enunciated in the Sixth Amendment applies, as do the other rights enumerated therein, to "all

(Footnote continued from preceding page)

by a term of imprisonment of up to one year and/or a fine of $1,000. Ill. Rev. Stats., ch. 38, § 1-7 (1969). The present statutory scheme consists of a more elaborate classification. There are three classes of misdemeanors. Class A, providing for a maximum penalty of one year imprisonment and/or $1,000 fine; Class B, providing for a maximum penalty of six months imprisonment and/or $500 fine; Class C, providing for a maximum of thirty days imprisonment and/or $500 fine. Ill. Rev. Stats., ch. 38, § 1005-5-1, § 1005-5-2, § 1005-9-3 (1977). Theft under $150 under the revised classification system is a Class A misdemeanor. Ill. Rev. Stats., ch. 38, § 16-1(e)(1) (1977).

criminal prosecution." To argue, as does petitioner, that this language creates an absolute right to appoinment of counsel once a proceeding is denominated "criminal" ignores the consistent refusal of this Court to impose a literal meaning upon the words of the Constitution. This "absolutest" position, most consistently articulated and rejected in cases involving the rights of freedom of speech and association,[4] would prohibit placing any limitations on enumerated rights. Neither the history of the Sixth Amendment nor the precedents of this Court support the view that the burden imposed on the State cannot be considered in defining the scope of a right.

It has never been held that every action classified as criminal must be deemed a "criminal prosecution" for purposes of the rights enumerated in the Sixth Amendment. Indeed, the Court has expressly recognized that the right to jury trial is not constitutionally required in all criminal cases. In *Baldwin* v. *New York*, 399 U.S. 66, 75 (1970) Mr. Justice Black in his concurring opinion argued that the phrase "in all criminal prosecutions" could not be read to limit the right to jury trials to only serious prosecutions. Rejecting this literal reading, the Court balanced the advantages to the defendant against the administrative burden it placed upon the State and concluded that the right to a jury trial was guaranteed in all "serious of-

4. Justices Black and Douglas consistently opposed application of the balancing test in the context of the First Amendment rights, espousing the view that there could be no limitation imposed on those rights. *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 56 (1961) (dissenting opinion of Mr. Justice Black). See also, *New York Times Co.* v. *United States*, 403 U.S. 713, 720 (1970) (dissenting opinion of Mr. Justice Douglas) and citations contained at 720, n. 1.

fenses" but did not extend to "petty offenses", *i.e.* those punishable by less than six months imprisonment. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968); *Baldwin* v. *New York*, *supra*. The Court explained the considerations relevant to its determination as follows:

> ". . . [T]he possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications." *Duncan* v. *Louisiana*, 391 U.S. at 161.

Although this Court in *Argersinger* refused to place exactly the same limitation on the right to counsel as on the right to jury trial, it did not thereby forbid placing any limitation on the right to counsel. Rejecting the argument that the right to appointed counsel should be limited to serious offenses as defined by *Baldwin*, *supra*, the Court nevertheless limited the right to counsel according to a standard focusing on the actual loss of liberty to the accused. The adoption of this approach exemplifies the use of the balancing test. Faced with the alternatives of allowing an accused to be deprived of his liberty without counsel or requiring the States to provide counsel for all indigents accused of any criminal offense, the Court imposed a standard accommodating both the rights of the accused and needs of society. By so doing, it reaffirmed both the constitutional validity and practical necessity of developing the "evolving concept" (407 U.S. at 44) of the right to counsel in light of the burden it would impose on society.

Neither the historical background of the Sixth Amendment nor the fact that many of the other Sixth Amendment rights have not been limited lend weight to petitioner's

assertion that the right to counsel must extend to all criminal actions. The fact that at common law there was a right to counsel for petty offenses but not for serious ones is not determinative of the present constitutional scope of the right to counsel. It has been suggested that the reasons behind this seemingly illogical distinction stemmed from the fact that the State had only a slight interest in convicting petty offenders and could therefore afford to be generous![5] This is hardly an acceptable rationale within the present constitutional framework where right to counsel has been interpreted as requiring "effective assistance of counsel." *McMann* v. *Richardson,* 397 U.S. 759, 771 n. 14, and cases cited (1970). Furthermore this Court has extended the right to appointed counsel to felonies despite evidence that the framers of the Sixth Amendment did not intend to provide appointed counsel in any cases.[6]

It is true that the Sixth Amendment rights other than the right to jury trial have never been defined on the basis of seriousness of the offense or of the penalty. Thus, the rights to a public and speedy trial, to compulsory process, to confront witnesses and to be informed of the nature of the accusation do not depend on the seriousness of the offense charged. (*Argersinger* v. *Hamlin,* 407 U.S. 27-29). The State, however, has no compelling pecuniary interest in a narrow definition of those rights, since the cost of their implementation is negligible. As has been pointed out

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5. Beaney, *The Right to Counsel in American Courts* 8 (1955).

6. Beaney, pp. 27-30.

7. Junker, John M. "*The Right to Counsel in Misdemeanor Cases,*" 43 Wash. L. Rev. 685, 707 (1968); Duke, Steven, "*The Right to Appointed Counsel; Argersinger and Beyond*", 12 Am. Cr. L.R. 601, 608 (1975).

by commentators,[7] it costs no more to provide a speedy and public trial in which the accused is given public notice of the charges than a delayed, secret trial without such notice. Similarly, limiting the right to confrontation and cross-examination has been found not to result in a substantial savings to the State.[8]

It is obvious that what the right to jury trial and the right to counsel have in common is their cost. Because they require considerable State expenditures, courts are asked to consider the burden these costs impose in developing the scope of these rights; no similar balancing is needed when considering the other Sixth Amendment rights.

Although petitioner urges that the right to counsel be extended to all criminal proceedings coextensively with the other Sixth Amendment rights excepting that of jury trial, there is no doctrinal prohibition against development of the right to counsel along lines completely different from either the Sixth Amendment rights which had been applied to all offenses or those applied to non-petty offenses only. The limitations already developed on the right to jury and to counsel show that each of the enumerated Sixth Amendment rights need not be uniformly treated and that "criminal prosecutions" need not have a fixed meaning independent of the particular right being asserted.

It is thus consistent with the prior decisions of this Court and with the development of the right to counsel for this Court to determine the boundaries of the cases to which that right applies on the basis of appraisal of the prerequisites of a fair trial in light of effective administration of criminal justice.

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8. Junker, at 707 and n. 128.

2. The Sanction Of Imprisonment, Traditionally Subject To Special Scrutiny, Is Inherently Distinguishable From Other Potential Consequences And Is A Rational Boundary For Drawing The Right To Counsel In Non-Felony Cases.

Actual loss of liberty was defined in *Argersinger* as providing the outer parameters for applying the right to counsel in non-felony cases. Since *Argersinger*, all of the federal circuit courts which have considered the issue have recognized that the Constitution does not require appointment of counsel in non-felony cases that do not result in actual deprivation of liberty.[9] More importantly, none of the circuit, except for the United States Court of Appeals for the Fifth Circuit,[10] have extended the right to counsel beyond that stated in *Argersinger*, thereby recognizing the soundness inherent in that rule.

A standard for right to counsel which distinguishes actual imprisonment from other sanctions comports with societal and judicial recognition that imprisonment is a unique sanction. Respect for liberty of an individual is the basic postulate upon which this nation was built. *Poe* v. *Ullman*, 367 U.S. 497, 542 (1967). Loss of that liberty has traditionally been viewed as a penalty which is inherently degrading, which stigmatizes an individual by its very imposition and which is almost exclusively imposed as a result of the criminal process. Because of these characteris-

9. *United States* v. *Sawaya*, 486 F. 2d 890, 892 (1st Cir. 1973); *In Re Di Bella*, 518 F. 2d 955, 957 (2nd Cir. 1975); *Marston* v. *Oliver*, 485 F. 2d 705 (4th Cir. 1973); *United States* v. *White*, 529 F. 2d 1390 (8th Cir. 1976); *Henkel* v. *Bradshaw*, 483 F. 2d 1386 (9th Cir. 1973); *Sweeten* v. *Sneddon*, 463 F. 2d 713 (10th Cir. 1972).

10. *Thomas* v. *Savage*, 513 F. 2d 536 (5th Cir. 1975).

tics, the imposition of imprisonment has always been subject to special scrutiny: "... [T]his Court will squint hard at any legislation that deprives an individual of his liberty —his right to remain free." *Williams* v. *Illinois*, 339 U.S. 235, 263 (1969).

Focus on loss of life and liberty has also been the benchmark of this Court's decisions regarding the right to counsel. In *Powell* v. *Alabama*, 287 U.S. 45 (1932), a capital case in which the court reversed convictions of defendants under sentence of death for failure to appoint counsel, the Court enumerated circumstances requiring appointment of counsel and focused "above all" on the fact that the defendants "stood in deadly peril of their lives." 287 U.S. at 71. Similarly in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), the Court in holding that counsel must be appointed for indigents in the federal courts repeatedly stressed that an accused could not be deprived of his "life or liberty" without the assistance of counsel. 304 U.S. at 462, 463, 468.

Argersinger elevated loss of liberty to the level of a constitutional standard. Although noting that *Powell* v. *Alabama*, *supra*, and *Gideon* v. *Wainwright*, *supra*, were felonies, the Court found their rationale applicable "to any criminal trial, where an accused is deprived of his liberty." 407 U.S. at 32. The special status of penalties resulting in actual imprisonment was most clearly shown by the Chief Justice, who would have applied the six month potential imprisonment rule defining the right to jury trial to the right to counsel as well, except for the fact that "any deprivation of liberty is a serious matter." 407 U.S. at 40.

When compared with the grave concern with which courts have traditionally viewed loss of liberty, the imposition of a small monetary exactment is inherently distin-

guishable. This Court gave explicit recognition to that difference in *Muniz* v. *Hoffman*, 422 U.S. 454, 477 (1975) where it held that imposition of a $10,000 fine did not require that defendants be afforded a jury trial:

> "It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, *imprisonment and fines are intrinsically different.*" (Emphasis added).

Petitioner does not contend that imposition of a fine is equivalent to a loss of liberty; clearly it is not. Citing *Mayer* v. *City of Chicago*, 404 U.S. 189 (1971), however, he does argue that the *de minimus* nature of the fine cannot be used as a basis for not assigning counsel. (Pet. Br. 43-44). The inapplicability of petitioner's analogy is demonstrated by focusing on the result of each alleged deprivation. In *Mayer* the Court prohibited the denial of free transcripts to indigents on the basis that the offenses were nonfelony or punished by fine only. The denial of transcripts to an indigent, where the burden is on the defendant to procure transcripts and demonstrate error, is a denial of all access to the appellate review process based on an individual's poverty. If counsel is not appointed in a nonfelony case, however, defendant nevertheless has access to a trial in which he is presumed to be innocent, in which the State must prove him guilty beyond a reasonable doubt and which cannot, upon conviction, result in his imprisonment.

In Illinois, as in most States, conviction of a misdemeanor can, although it infrequently does, result in a sentence of probation.[11] Although the question of whether probation imposes a deprivation of sufficient magnitude to require counsel is not before this Court in this case, the significant distinction between sentences of imprisonment and probation should be noted when advocating a rule requiring appointment of counsel only when a jail sentence is imposed.

As this Court has noted, although probation infringes on personal freedom, it does so considerably less than does imprisonment. *Frank* v. *United States*, 395 U.S. 147, 151 (1968). This is especially true in non-felony cases, where the terms of probation imposed will most likely be of the least restrictive variety, usually requiring only monthly reports to a probation officer. More importantly, as a practical matter, the goals of the sentence of probation, together with the costs of such services, dictate that probation be imposed as a sentence in only the more serious misdemeanors. By virtue of their seriousness, however, these cases will already be screened out under the pre-trial evaluation system as cases in which the imprisonment option must remain an available alternative.

In addition to the actual sentence imposed, there may also be collateral consequences to a defendant as a result of a conviction. Thus, as petitioner points out, besides

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11. There are three variants of probationary status provided: "probation", Ill. Rev. Stats., ch. 38, § 1005-1-18, 1005-6-2 (1977); "conditional discharge", Ill. Rev. Stats., ch. 38, § 1005-1-4, 1005-6-2 (1977); and "supervision", Ill. Rev. Stats., ch. 38, § 1005-1-21, 1005-6-3.1 (1977). Successful completion of conditions of "supervision" results in dismissal of charges. Ill. Rev. Stats., ch. 38, § 1005-6-3.1 (e)(f) (1977).

the stigma attached to a conviction, a non-felony conviction could also affect his eligibility for certain jobs or be used for impeachment purposes. (Pet. Br. 44). Petitioner argues that these consequences may be more severe than imprisonment and therefore require appointment of counsel. To determine the necessity for counsel, however, on the basis of the actual consequences of the deprivation to that individual would be an unworkable standard. As has previously been recognized by this Court, there are frequently difficulties attendant upon drawing boundaries because "it requires attaching different consequences to events which, when they lie near the line, actually differ very little" *Duncan* v. *Louisiana*, 391 U.S. at 161. The characteristics inherent in the sanction of imprisonment provide a recognized, rational and distinguishable boundary. That the consequences of revoking a driver's license may be more significant to one individual than another cannot be determinative of the constitutionality of drawing boundaries. If it were required that the consequences of punishment be comparable for all individuals,

> ". . . . [T]he State would be forced to embark on the impossible task of developing a system of individualized fines, so that the total disutility of the entire fine, or the marginal disutility of the last taken, would be the same for all individuals." *Williams* v. *Illinois*, 399 U.S. 235, 261 (1970) (Harlan, J., concurring).

Lastly, the collateral consequences which accrue to the individual as a result of a conviction of a misdemeanor do so only after that individual has had a hearing in which he was found guilty beyond a reasonable doubt. To subject an individual to collateral consequences after a judicial determination as to credibility of witness and evidence has been made and after a finding of guilty beyond a reasonable doubt is consistent with the constitutional mandate. Had

there been any question of sufficiency of evidence, or unfairness at the trial, petitioner in this case would have raised those issues in the Illinois Courts. The fairness of the trial would then have been reviewed, thus providing safeguards against collateral consequences of a conviction of which he was innocent. That he did not do so shows the fairness of the proceedings.

Petitioner also attacks the use of actual imprisonment as the basis for requiring counsel on the ground that the standard will render sentences themselves of dubious effectiveness, because the indigent uncounseled defendants will be immune from sanctions for non-payment of fine or violation of probation. Additionally he argues that the violations would be unavailable for subsequent enhancement of penalties under second offender statutes. (Pet. Br. 34-35).

There has been some question as to whether failure to pay a fine which results from an uncounseled conviction can result in imprisonment. After *Tate* v. *Short*, 399 U.S. 235 (1970), states are prohibited from converting a fine into a prison term for indigents unable to pay the fine. See, *e.g.*, Ill. Rev. Stats., ch. 38, § 1005-9-3(b)-(c) (1977). For those financially able but refusing to pay the fine, however, the subsequent proceeding to enforce the fine has been held by some courts to be a contempt proceeding, separate and sufficiently removed from the original conviction so as to permit imprisonment for non-payment. *Rollins* v. *State*, 299 So. 2d 586 (Fla. 1974).

With respect to the use of an uncounseled conviction as the basis of a probation revocation proceeding or to enhance a subsequent offense, the use of such convictions to incarcerate an individual depends on how direct the first conviction is to imprisonment. Generally such use has been

prohibited. Krantz, et al., *Right to Counsel in Criminal Cases: The Mandate of Argersinger* v. *Hamlin*, 35-37, 44 (1976) hereinafter cited as Krantz. This result, however, is not inconsistent with state purposes but is legitimately within the realm of prosecutorial discretion. When prosecuting an offense the prosecutor knows that by not requesting that counsel be appointed for defendant, he will be precluded from enhancing subsequent offenses. To the degree that the charging of offenses involves a great deal of prosecutorial discretion and selection, the decision to pursue conviction with only limited use comes within proper scope of that discretion.

Finally, the function of ensuring the effectiveness of legislative sentences is properly a judicial and legislative function of local government. If the States find that they cannot enforce the penalties they are enacting because of *Argersinger* prohibitions, appropriate adjustment suitable to the needs of each particular locality can be made at the local level. This Court should not engage in constitutional rulemaking to ensure what is properly a legislative function.

C.

The Right To Appointed Counsel Should Not Be Applied To All Offenses Punishable By Imprisonment Because The Costs Of Such Extension Would Far Exceed The Benefits Which Attorneys Could Provide In Those Cases.

1. The Benefits Derived From Assistance Of Counsel Is Minimized By The Nature Of Proceedings In Non-Felony Courts.

Consideration of the nature of the proceedings and the role of lawyers in non-felony courts provides additional support for using actual imprisonment to draw the boundary of the right to appointed counsel. In *Gideon* v. *Wainwright*, 372 U.S. at 335, the Court based it conclusion that lawyers are necessities in criminal courts on the fact that the government hires prosecutors and that non-indigents hire lawyers:

> "Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can to prepare and present their defenses."

While the stakes in felony cases are such that most defendants would not forego assistance of counsel if it were within their means,[12] those charged with non-felony violations frequently do not employ counsel.[13] The cost of hiring counsel in minor cases is typically weighed against the potential benefit of the attorney's services. This is especially true where the possibility of jail seems remote and the probable fine small (407 U.S. at 49) since attorney costs would frequently exceed the amount of the fine. To the vast majority of the population, hiring an attorney to defend against minor offenses would indeed be a "luxury."

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12. D. Oaks, *The Criminal Justice Act in the Federal District Courts* III-36 (1967).

13. For example, in a survey conducted by the Illinois Law Enforcement Commission of 9,436 misdemeanor cases tried in the State of Illinois in 1976, it was found that 49.4% of defendants were not represented by counsel; only 23.8% had retained counsel; the remainder of the defendant population was represented by public defenders or assigned counsel. From Defense Services Survey, Illinois Law Enforcement Commission, Planning Division (1977). See also *Argersinger* v. *Hamlin*, 407 U.S. at 49-50, where Mr. Justice Powell points out the anomaly created by extending the right of appointed counsel to cases where non-indigents would rarely retain counsel.

Moreover, the nature of the proceedings in the non-felony courts are significantly different from those in felony courts. In *Johnson* v. *Zerbst*, 304 U.S. 458, 462-3 (1938) the Court stated that:

> "The Sixth amendment . . . embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*" (Emphasis added).

The reality of misdemeanor courts, however, is that procedures are informal and rules of evidence are not strictly adhered to. The instant case, typical of those arising in high volume urban non-felony courts, is indicative of the relaxing of the "adversarial" context. The prosecutor should properly have been expected to "present evidence to the court, challenge any witnesses offered by the defendant, argue the rulings of the court and make direct arguments to the court" to establish petitioner's guilt. *Ross* v. *Moffitt*, 417 U.S. 600, 610 (1974). The prosecutor here, however, made neither opening nor closing statements, did not object to any testimony offered by petitioner, did not question or cross-examine petitioner, and did not call rebuttal witnesses. His role was merely one of eliciting testimony from the State's witness.

Nor is this an unusual situation. As has been pointed out, new lawyers entering the field of prosecution are traditionally assigned to the misdemeanor and traffic dockets and view assignment to a felony caseload as a significant promotion.[14] These inexperienced prosecutors often have an

14. U. S. President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* 128 (1967), hereinafter cited as *The Challenge*.

excessive caseload, do not see the file or complaint until actually in the courtroom, and frequently never talk to the witnesses prior to calling them to testify. That they are required at all is perhaps recognition that the prosecution has the burden of proving guilt beyond a reasonable doubt and that failure to prove an element of the offense, or identify, or venue can result in dismissal of the case for technical reasons. In fact, in some non-felony courts, there are no prosecutors; in such cases the judge asks questions after police presentation of their case.[15] In a recent survey of misdemeanor courts, it was reported that even with appointed counsel present, the trials which were conducted were characterized by lack of formal motions, non-existent cross-examination and quick disposition of cases.[16] The comment of one observer watching the processing of non-felony cases in a municipal courtroom was that they seemed to be processed at the rate of one per minute.[17]

It is therefore apparent that the adversarial system characterized by petitioner as being incomprehensible to the layman and the basis for his need for assistance of counsel is in reality not nearly as adversarial as he suggests.

15. Observation of Belle Glade, Florida, Municipal Court, where it was noted that non-attorney cases were not limited to the indigent. Krantz, *supra* at 210. See also, *The Challenge*, *supra* at 128.

16. Observations of Cleveland Municipal Court, Krantz, *supra*, at 205. Similar observations were made of court systems in San Jose, Texas, where defense counsel consulted with newly assigned defendants in the courtroom, often while proceedings continued. In all of the jurisdictions observed, it was noted that the majority of the cases were immediately plea bargained. Krantz, *supra*, at 203-210.

17. Krantz, *supra*, at 205. Observation of Cleveland Municipal Court.

Indeed, petitioner's arguments that failure to appoint counsel negated his other Sixth Amendment rights cannot withstand scrutiny if viewed in the context of the reality of the overcrowded misdemeanor courts described.

Just as the overriding pressure for plea bargaining is an undeniable reality in misdemeanor court, so also is the actual rarity of the jury trial.[18] Under Ill. Rev. Stats., ch. 38, § 103-6 (1969) and under *Duncan* v. *Louisiana, supra,* petitioner would have been entitled to a jury trial. Since he waived that right in response to a question from the court (A. 7), petitioner's argument is inapplicable to the instant case. It is, however, far from clear that the goals of a trial as a fact finding mechanism for ascertaining whether an accused individual committed a crime cannot be achieved by an unrepresented defendant before a jury.[19] This Court has never held that the right to appointed counsel exists in every case where there is a right to jury trial.[20] To hold

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18. Report of the Public Defender of Cook County, Municipal Districts 2-6 (Suburban districts, excluding City of Chicago) from 12/1/77 to 6/30/78 shows that the Office of the Public Defender disposed of 4997 Traffic and Misdemeanor cases during that period of time. Of the 4997 cases, there were 8 jury trials. (The remaining cases were disposed of as follows: "Plea of guilty"—2003; "Supervision"—2339; 'Plea of Not Guilty-Finding of Guilty"—276 (bench); "Plea of Not Guilty-Finding of Not Guilty"—371 (bench).

19. See, *e.g. Faretta* v. *California,* 422 U.S. 806 (1975) where defendant held to have the right of self-representation in a jury trial involving a felony charge.

20. *Argersinger* contains some support for both positions. Chief Justice Burger, by directing the prosecutor in a jury case to help the judge decide regarding the significant likelihood of imprisonment, indicated that the right to

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that the right to counsel must be coextensive with the right to jury trial would require the State of Illinois to either limit the right to jury trial which presently exists in all criminal cases, including those punishable by fine only and traffic offenses, or to extend the right to counsel to all those offenses. The former result is undesirable in view of the legislative intent to provide a broad right to jury trial in this State—broader, in fact, than constitutionally required. *Duncan* v. *Louisiana, supra.; Baldwin* v. *Illinois, supra.* The latter result would be prohibitively expensive and probably not chosen. Under the guise of interpreting the Sixth Amendment's broadly worded principle, the State of Illinois should not be put to the Hobson's Choice which petitioner's theory creates.

2. The Costs Of Providing Counsel For Indigents In All Non-Felony Cases Would Impose A Tremendous Burden On Society.

In determining the scope of the right to counsel which must be provided to indigents in non-felony cases, this Court must consider the economic burdens which will be imposed upon the courts by any extension of the right to counsel beyond *Argersinger.* As stated by the Chief Justice in his dissenting opinion in *Faretta* v. *California,* 422 U.S. 806, 845 (1975):

> "Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered."

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jury trial is independent of and does not require the right to appointed counsel. 407 U.S. at 42. Justice Powell, however, stated that the right to counsel line must be drawn "so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial." 407 U.S. at 46.

In *Argersinger,* Mr. Justice Powell detailed a number of concerns regarding the costs of implementing the rule announced in that case, 407 U.S. at 56-63. If, as petitioner claims (Pet. Br. 37, n.21), *Argersinger* did not in fact impose extraordinary burdens on court systems, that may well be because incarceration is not commonly contemplated or imposed in non-felony cases.[21] Comprehensive post-*Argersinger* studies, however, belie not only petitioner's assertions regarding the impact of *Argersinger,* but also his claim that further extensions will not impose impossible burdens on a great number of local court systems.

As predicted (407 U.S. at 61), the court systems most burdened by the *Argersinger* extension of the right to assigned counsel were those of small rural communities. In its 1973 survey of defender systems, the National Legal Aid and Defender Association studied 2227 counties with over one-third of the country's population which did not have defender systems but utilized appointed private counsel to defend indigents. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, L. Benner and B. Lynch-Neary, *The Other Face of Justice: A Report of the National Defender Survey* 38 (1973) (hereinafter cited as *The Other Face of Justice*). These jurisdictions had great difficulties implementing *Argersinger,* due to both lack of attorneys and the incapability of local governmental units to support such services. *Id.,* at 38-40, 63. The NLADA study reported the following assessment of one judge on the impact of *Argersinger* on their system in South Dakota: "... [A]lmost the straw that broke the camel's back." *Id.,* at 38.

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21. Krantz, *supra* at 366, 417. Additionally, the survey suggests that at least in one community there was a sizeable decrease in the frequency of imposed jail sentences after *Argersinger.*

More ominously, however, the results of the survey showed in many jurisdictions judges were simply not incarcerating misdemeanor defendants because of the inability to provide counsel for them. *Id.,* at 40, 64. Thus, an extension of *Argersinger* to prohibit *any* conviction without counsel would fulfill the prediction of Mr. Justice Powell: that those 2227 counties "simply could not enforce [their] own laws", 407 U.S. at 61.[22]

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22. The problems experienced by one town in the small predominantly rural State of South Dakota due to scarcity of lawyers was described in *Argersinger,* 407 U.S. at 61 (Powell, J. concurring). The problems of the 253 towns in South Dakota with no resident attorneys and of the counties with only one lawyer (usually the State's Attorney) are described in *Application of Wright,* 189 N.W. 2d 447 (1971), vacated by 407 U.S. 918; on remand 199 N.W. 2d 600 (1972).

The same problems are faced by rural areas in larger industrial states such as Illinois. Out of a total number of 102 counties in Illinois, 13 counties have fewer than 10 attorneys, and another 34 have fewer than 20. See "Report of Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, April, 1978."

The difficulties which rural counties will encounter if required to appoint counsel for indigents in all non-felony cases punishable by imprisonment are illustrated by the attorney population and caseload of Brown County, Illinois. That county is one of the smallest in Illinois, with a population of 5,586; there is no public defender system, and private counsel is assigned to indigents when required. Ill. CRIMINAL DEFENSE OF INDIGENTS IN ILLINOIS, REPORT TO THE ILLINOIS LAW ENFORCEMENT COMMSSION, ILLINOIS DEFENDER PROJECT DEFENDER SURVEY 21 (1974) (hereinafter cited as ILLINOIS DEFENDER SURVEY).

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Nor are the problems of requiring increased representation limited to rural areas. There are approximately 1,250,000 to 2,710,820 indigent non-traffic misdemeanor defendants arrested annually.[23] The increase in attorneys needed

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In 1976 the number of new charges filed in Brown County were as follows: 15 felonies, 46 misdemeanors, 853 traffic and 34 conservation violations. *ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, 1976 ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 125.* Applying the national 65% indigency rate for felonies (*infra,* n.23), to the 1976 figures under the *Argersinger* standards, appointed counsel was required for 10 felony cases and for any other offense in which imprisonment was imposed as the sentence. If the "authorized imprisonment" standard had been in effect in 1976, applying the 47% national indigency rate for non-felonies (*infra,* n.23) to the total number of non-felony offenses shows that appointed counsel would have been required in approximately 420 non-felony cases.

There are seven attorneys in Brown County, including the county judge and the state's attorney. The difficulty of attempting to obtain representation for 420 additional cases from the other five attorneys in the county is obvious. This difficulty is highlighted by consideration of the legal disabilities which preclude a number of these attorneys from accepting appointments to represent indigent defendants (*e.g.* partnership association with part-time state's attorney; position as City Attorney; part-time position as Assistant Attorney General, see *People* v. *Cross,* 30 Ill. App. 3d 199, 331 N.E. 2d 643 (4th Dist. App. 1975).

23. *The Other Face of Justice, supra* at 72 reports an annual figure of 2,710,821. Other estimates are as low as 1,250,000. *See generally* Duke, *supra;* Rossman, "*The Scope of the Sixth Amendment: Who Is A Criminal Defendant,* 12 Am. Crim. L. Rev. 663 (1975). The large differences in

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to represent indigent defendants charged with non-traffic misdemeanors if the *Argersinger* rule is expanded to require representation whereever imprisonment is authorized would be overwhelming.[24] For example, it was estimated that adoption of the authorized imprisonment standard in Birmingham, Alabama would require expenditures of amounts ten times the existing spending level. Krantz,

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numbers can be partially explained by differences in estimates of how many non-felony defendants would meet necessary indigency standards. Thus, although petitioner cites 10% as the percentage of misdemeanor defendants qualifying for appointed counsel (Pet. Br. 39), more realistic studies have found that 47% of the total misdemeanor population is indigent (compare, 65% indigency rate for felonies). *The Other Face of Justice, supra* at 82-83.

Confirming the above, a similar study in Illinois showed indigency rates for misdemeanors ranging from 31% to 68.3%. The average for all areas was substantially similar to the 47% rate found by the NLADA. ILLINOIS DEFENDER SURVEY, *supra* at 53.

24. The NLADA in 1973 found that there were fewer than 3,000 full time public defenders handling all the representation of indigents—both felony and misdemeanor—in the nation. It is estimated that under an "authorized imprisonment" standard, 4,794 full time defenders would be required to represent the non-traffic misdemeanor indigents alone. (In arriving at this figure, the NLADA assumed that approximately one-fourth of the representation required by indigent misdemeanants would be handled by appointed counsel).

It should be noted that these statistics have been subject to some criticism, see Krantz, *supra* at 12, 14. They are indicative, however, of the great increase in the number of public defenders that would be required by the adoption of petitioner's proposed standards.

supra at 361. Similar increases would also be required in other urban areas.[25]

The potential burden of adopting a rule requiring the appointment of counsel for all cases authorizing imprisonment is most extremely illustrated by the prospect that ap-

25. In Cleveland, Ohio, it was estimated that the adoption of an authorized imprisonment standard would require indigent representation at ten times the level then being provided. Representation was provided for 700 to 1300 indigent misdemeanants under the *Argersinger* standard; approximately 7,000 would require representation under the "authorized imprisonment" standard. Krantz, *supra* at 417.

An approximate idea of the potential dollar cost of an expanded counsel requirement can be obtained by looking at the budget of the Cook County Public Defender's Office. In 1977, 72 assistant public defenders handled 61,505 "municipal district" cases (these include misdemeanors, appearances on felonies through preliminary hearings and probation violation petitions) at a total salary cost of $1,740,540. The operation of this portion of the office was almost 23% of the total operational budget of the office ($7,603,923.63). (The Annual Appropriation Bill for 1977, approved and adopted February 24, 1977; County Board of Commissioners, Cook County, Illinois, pp. 228-229. Cook County Budget for Fiscal Year 1978, passed February 14, 1978, Cook County. Report of Proceedings, p. 1275).

In 1977, the number of "municipal district" cases disposed of in the Circuit Court of Cook County totaled 309,673. The number of traffic cases terminated totaled 1,471,336. (Administrative Office of the Illinois Courts, "Statistical Report on the Circuit Court of Cook County, Illinois for Calendar Year 1977," April 17, 1978; to be published in *Administrative Office of the Illinois Courts, 1977 Annual Report to the Supreme Court of Illinois*).

Applying a 47% indigency rate (see n.23, *supra*) to the total "municipal district" caseload results in a total of

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pointment of counsel will be necessary in all traffic offenses.[26] The potential burden is staggering: an estimated 50 million moving traffic violations are processed annually throughout the country. It has been estimated that as many as 23,500,000 traffic offenders could qualify as indigents and therefore be entitled to appointment of counsel. *The Other Face of Justice, supra* at 76, n.42; 83. Since in the United States most violations of traffic rules are considered criminal acts,[27] an adoption of the "authorized imprisonment"

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144,746 cases which would require representation. That figure would more than double the workload of the public defenders in the "municipal district" section, adding an additional 83,241 cases to the present 61,505 case workload; alternatively, hiring additional lawyers to handle the increased workload could potentially more than double the salary allocation needed for that division, making it close to $4,000,000.

Applying the same 47% rate of indigency to traffic offenses (see *The Other Face of Justice, supra* at 83) there could be as many as 691,522 indigent traffic offenders requiring representation. (Statistics describing the number of public defenders presently handling indigent traffic cases, or the costs of such representation were unavailable; no estimate has therefore been made of the potential costs of requiring appointment of counsel for indigent traffic offenders).

26. Petitioner advocates a standard requiring the appointment of counsel for all offenses punishable by imprisonment, including traffic violations, taking the position that exclusion of even minor traffic violations would be arbitrary so long as they carry a possible penalty of imprisonment. (Pet. Br. 16 and n.4).

27. Krantz, *supra* at 595, n.75, citing Arthur Young & Co., *A Report of the Status and Potential Implications of Decriminalization of Moving Traffic Violations* 3 (1972).

The Illinois Vehicle Code, Ill. Rev. Stats., ch. 95½, § 1, *et seq.* (1977) contains hundreds of possible traffic offenses,

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standard urged by petitioner will create a right to counsel of "astronomical proportions." Krantz, *supra* at 595.

The severity of the burden which adoption of petitioner's proposed standard would impose has been recognized by all the post-*Argersinger* studies. Most of those commentators, while advocating the extension of the right to counsel to all imprisonable offenses, have agreed that such an extension will tremendously over-tax the system. Krantz, *supra* at 124; Duke, *supra* at 618. They therefore accompany their advocacy of the extension of *Argersinger*, as does petitioner, with various proposals for reform.

One of the most frequent suggestions advanced is the decriminalization of offenses for which imprisonment is rarely imposed. Despite the fact that only a few states have de-

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carrying varying penalties depending on their misdemeanor classification (see n.3, *supra* describing misdemeanor classifications). Thus, for example, "driving while intoxicated" or "failure to give information or render aid" are class A misdemeanors, Ill. Rev. Stat., ch. 95½, § 11-501, § 11-403 (1977); "eluding a police officer" or "reckless driving" are class B misdemeanors, Ill. Rev. Stats., ch. 95½, § 11-204, § 11-503 (1977); "drag racing" or "providing false information" are class C misdemeanors, Ill. Rev. Stats., 95½, § 11-504, § 11-409 (1977).

Vehicle Code violations that are not specifically classified are considered "petty" and are therefore not punishable by imprisonment. Ill. Rev. Stats., ch. 95½, § 16-104, § 1-300; Ill. Rev. Stats., ch. 38, § 1005-1-17 (1977). However, conviction of a third or subsequent petty offense within a year is a class C misdemeanor, punishable by up to 30 days imprisonment. Thus, under the enhancement theory, to preserve the legislatively afforded option of imprisonment for the third offense, counsel would be required for all three charges. As a result, in Illinois appointed counsel would be required for all indigents charged with traffic offenses.

criminalized them, Krantz, *supra* at 598, this recommendation is most frequently made with respect to moving traffic offenses. Although the deterrent value of the threat of a jail sentence, even if rarely imposed, has been recognized as serving a legitimate social function, *Argersinger* v. *Hamlin*, 407 U.S. at 53-54 (Powell, J. concurring), the merits of the decriminalization suggestions are not properly debated in this Court. Those recommendations should be addressed to the legislative bodies of each of the states whose function it is to classify offenses and prescribe penalties. To ask this Court to adopt a rule, which by its effect would accomplish by judicial fiat what legislatures have refused to do, is to advocate judicial usurpation of legislative functions and a serious violation of the principle of federalism as well. This Court has in the past recognized that fact and has refused to substitute its judgment for that of state legislatures.

Petitioner further attempts to minimize the burden which his proposed rule would impose on the state by pointing to the fact that 22 states have already adopted such a rule.[28] (Pet. Br. 40). A review of the relevant state statutes shows the wide range of state approaches to the problem of providing counsel for indigent defendants. Different jurisdictions have adopted a variety of cutoff points for requiring counsel: some provide counsel for all non-felony offenses; others have excepted traffic offenses; still others have used

28. The Appendix to petitioner's brief lists 22 states which allegedly have extended the right to counsel to all offenses punishable by imprisonment. However, the statutes and caselaw of six of those states—Arizona, Connecticut, Michigan, Minnesota, Ohio and Texas—need not be read as requiring appointment of counsel for all imprisonable cases. While those states may require broader representation than that required by *Argersinger*, it is not yet clear that they require appointment of counsel for indigents in all cases punishable by imprisonment.

varying dollar limits and potential terms of imprisonment to delineate the scope of the right. (See Respondent's Appendix A).

What all of these boundaries reflect is a sensitive balancing between the rights of the defendant to be represented and the capacity of the particular system to provide representation. Legislatures are in the best position to decide what allocation should be made of their own dwindling resources in this era of tax revolt. The fact that some have chosen to allocate their available resources by extending the right to counsel beyond what is constitutionally required does not reflect on the constitutional necessity of such expansion. As this Court stated in *Ross* v. *Moffit*, 417 U.S. 600, 618 (1974) in describing states which did not provide counsel to indigent defendants seeking discretionary review on appeal:

> "Some states which might well choose to do so as a matter of legislative policy may conceivably find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy at the present time."

That approximately 16-22 states have already expanded the right to counsel beyond *Argersinger* is conclusive evidence only of the fact that 28-34 have not. Additionally it illustrates the already existing sensitivity of the states to a defendant's right to counsel and the tendency to expand it when possible.

In his attempt to minimize the burdens accompanying the adoption of an "authorized imprisonment" standard, petitioner also suggests that the additional costs of providing representation for non-felony indigents would be offset by the accompanying savings in court costs due to the more expeditious completion of cases. (Pet. Br. 41). It is likely, however, that exactly the opposite will occur. It is, for example, common to assign inexperienced attorneys to misdemeanor courts so they can "cut their teeth" in those courts. Krantz, *supra* at 165. Mr. Justice Powell in *Argersinger*, 407 U.S. 58-59, aptly summarized the multiple reasons why such inexperienced lawyers are likely to add to the congestion in the courts. Similarly, expediting the completion of cases is frequently not the goal of experienced lawyers, who often help cause delay either by reasons of necessity or as a matter of sound defense tactics.

Finally, respondent urges that the social cost of the broad rule advocated by petitioner is simply too great to permit its adoption. Lack of financial and manpower resources has seriously hampered many defender systems from providing effective representation for defendants for whom representation is presently required.[29] In rural communities both the cost of services and the scarcity of qualified attorneys pose great difficulties in procuring effective representation for indigents.[30] The problem of providing increased services continues to grow even without the imposition of additional requirements,[31] and, at the same time,

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29. *The Other Face of Justice*, *supra* at 77. Results of a survey conducted by NLADA showed that the most frequent recommendation made by judges and procesecutors to improve defender services was to increase the number of defender staff attorneys.

30. See *Partain* v. *Oakley*, 227 S.E. 2d 314 (W.Va. 1976), where the Court listed four factors which reduced the number of attorneys available for criminal representation and therefore increased stress on available resources: (1) increased complexity of criminal defense; (2) strict standard of performance required for criminal defense; (3) ongoing movement towards specialization; (4) attorneys entering governmental service or other areas not involving active practice of law.

31. Thus, for example, statistics for Cook County, Illinois, show a 258% increase in the pending inventory of

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there is no evidence that the number of attorneys qualified to provide indigent representation has increased.[32]

Respondent submits that this Court may take notice that there is a finite amount of resources available for allocation. This principle applies with equal force to Sixth Amendment resources, *i.e.* money available to pay lawyers for indigent defense. It is further not unrealistic to assume that many communities are already expending the maximum amount available on defender services, and also to note that, especially at present, tax rates are not likely to

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felony cases from 1972-1976, *Administrative Office of the Illinois Courts, 1976 Annual Report to the Supreme Court of Illinois 85* (hereinafter cited as *1976 Report to the Illinois Supreme Court*). Comparison of felony cases begun in 1972 and 1976 shows a 103% increase; a similar comparison of misdemeanor cases shows a 23% increase. *Id* at 35.

32. Suggestions that use of law students may ease the burden on defense systems have met with criticism on the grounds that law students do not meet the threshhold concept of counsel and that they are generally located in areas where there are numerous lawyers. Additionally, as a practical matter, the number of law students available for defense representation is small and cannot be expected to significantly supplement the existing defense services. Krantz, *supra* at 274-6.

In Illinois, senior law students can obtain temporary licenses under Illinois Supreme Court Rule 711, Ill. Rev. Stats., ch. 110A, § 711 (1977). This Rule allows law students, with the proper supervision, to participate in internship programs with legal aid offices, public defender offices and state or local agencies. In 1976 there were 530 law students participating in the program; 85 of these were associated with public defender offices. *1976 Report to the Illinois Supreme Court 78-79.*

be raised to accommodate increased costs of appointing counsel. It can therefore be expected that in many jurisdictions the response to an extension of the right to counsel would be simply to assign more cases to already overwhelmed public defenders.

Thus, the alternatives are well delineated. The resources available can be spent by providing attorneys for all defendants or by defining eligible defendants by an ascertainable criterion, such as actual imprisonment. To choose the former is to elect to provide what will amount to only pro forma representation for all indigent defendants at the expense of those who could derive the greatest benefit from a vigorous defense. Since such broad allocation of Sixth Amendment resources will necessarily limit the amount of assistance available to all, those facing the most severe consequences—loss of life or liberty—will necessarily bear the costs of such a choice. Neither these individuals nor society can afford so steep a price.

D.

Effectuation Of The "Actual Imprisonment" Standard By Use Of Predictive Pre-Trial Evaluation Comports With The Requirements Of Due Process.

In *Argersinger* v. *Hamlin*, 407 U.S. at 40, 41 this Court mandated that certain procedures be followed in non-felony trials if imprisonment was to be imposed as a sanction. Petitioner contends that this predictive evaluation procedure is inherently arbitrary, violative of due process and abrogates the intent of state legislatures to allow a trial court the full range of sentencing options. (Pet. Br. 31-33).

It is inconceivable that this Court would deliberately mandate a procedure by which trial courts would consistently violate the Fourteenth Amendment in reliance upon this

Court's judgment. In *Argersinger,* this Court specifically told the judges throughout the country that

> "Under the rule we announce today, every judge . . . will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts." 407 U.S. at 40.

Mr. Chief Justice Burger went on to explain that this measure of gravity would be obtained by a "predictive evaluation" to determine whether there was a "significant likelihood" that upon conviction incarceration would be imposed. The Chief Justice expressed confidence in the abilities of "an experienced judge, aided . . . by the prosecuting officer" to evaluate cases on a rational basis prior to trial. 407 U.S. at 42.

The feasibility of such "predictive evaluation" is demonstrated by the facts of this case. While there was no actual predictive evaluation in this case, which was tied approximately six months *before Argersinger* was decided, it is clear that any judge, sitting day after day in the misdemeanor courts of Cook County, with hundreds of shoplifting cases before him weekly, could glance at the complaint and immediately take cognizance of the following: (1) that worth of the property allegedly stolen was $13.68; (2) that the victim was a local dimestore; (3) that the offense was not charged under the enhancement portion of the theft statute. Those facts, together with a negative answer from the prosecutor to the question "do you intend to ask for jail time?", are sufficient to enable the "experienced" trial court judge to gauge with considerable accuracy the likelihood of a jail sentence, or more precisely, whether he wishes to preserve the option of imprisonment as a sentence.

This approach has the benefit of personalizing what has been called the "classes of offense" method of predictive evaluation,[33] *i.e.* isolating the classes of misdemeanors for which jail is almost never imposed from those in which a jail sentence is a real possibility. Such an approach in this case, for example, would permit recognition of the fact that shoplifters are generally punished with token fines only.[34] Thus, the frequency of shoplifting cases, Krantz, *supra* at 589, combined with the rarity of jail sentence, combine to permit a reasonable determination that the likelihood of jail sentence is virtually non-existent and the appointment of an attorney unnecessary.

Eliminating one potential sentence, unlikely to be imposed in any event, neither precludes rational individual sentencing of an individual subsequently convicted nor departs from traditional sentencing methods. Legislatures establish sentencing alternatives so that the trial court judges have a broad range of choices. This range is exemplified by the instant charge for which petitioner could have been punished by as little as a $1.00 fine or up to one year imprisonment. The Illinois Appellate Court in its opinion (Pet. for

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33. Although some commentators have preferred the "class-of-offense" standard to that of a case-by-case individualized predictive evaluation, see *e.g.* Junker, *supra* at 710; Duke, *supra* at 612, others have criticized it as usurping the power of the legislature to fix sentences by determining that for certain classes of cases an authorized penalty will never be used. Krantz, *supra* at 90-91.

34. Krantz, *supra* at 590, n.35, cites M. Cameron, *The Booster and the Snitch* 108 (1964) as reporting that the usual sentence for shoplifters in Chicago Municipal Court was "one day considered served, and one dollar considered payed."

Cert. 15a) stated that "in its predictive evaluation, the trial court is actually exercising the full range of its legislatively-afforded sentencing options by discarding some of those options in its search for the most appropriate sentencing alternative." Furthermore, the Illinois Supreme Court reviewed the predictive evaluation proceeding in light of the statutory requirements and found that it satisfied the legislative purpose.

Finally, petitioner urges that he was entitled to an on-the-record hearing and determination on the question of whether he was entitled to counsel. Failure to afford him such a hearing, he claims, was a denial of due process. (Pet. Br. 59).

Under *Argersinger,* there was no requirement for such a hearing; any error made in deciding not to appoint counsel was self-correcting since lack of counsel precluded a penalty of imprisonment. Nor does due process require that petitioner be accorded such a hearing, for even under the guidelines outlined by Mr. Justice Powell in his concurring opinion, 407 U.S. at 64, petitioner would not have been entitled to counsel. Neither the complexity of the offense, probable sentence or any individual factors set forth by petitioner would result in appointment of counsel in this straightforward shoplifting case in which a $50 fine was imposed.

II.

PETITIONER'S ARGUMENT THAT THERE IS A FOURTEENTH AMENDMENT RIGHT TO COUNSEL APART FROM THE SIXTH AMENDMENT RIGHT SHOULD NOT BE CONSIDERED BECAUSE IT HAS BEEN WAIVED; ALTERNATIVELY, IT SHOULD BE REJECTED.

A.

This Court Should Not Consider Petitioner's Claims That Failure To Appoint Counsel Violated Due Process And Equal Protection, Or His Contention That He Was Not Afforded A Fair Trial Because Petitioner Has Waived Those Issues.

Petitioner never alleged or argued in the state courts of review three issues which he now seeks to present for review: that the due process clause of the Fourteenth Amendment requires appointment of counsel (Pet. Br. II, 22-42); that the Equal Protection Clause of the Fourteenth Amendment requires appointment of counsel (Pet. Br. III, 47-50); that he was denied due process because his trial was unfair (Pet. Br. V, 60-65). Consequently, neither the Illinois Supreme Court nor the Appellate Court of Illinois ruled upon these claims (Pet. for Cert. 1a-21a).

In determining Supreme Court jurisdiction over issues in appeals from state courts, this Court has held that it is the obligation of each state to prescribe the jurisdiction of its appellate courts as to local, state and federal issues. *John* v. *Paullin,* 231 U.S. 583, 585 (1913). Illinois has determined that points not argued in an appellant's brief in the reviewing court are waived. Illinois Supreme Court Rules 341(e)(7), 617(j), Ill. Rev. Stats., ch. 110A, § 341(e)(7), 612(j) (1977). When a litigant has raised an issue for the first time in this Court despite a state rule providing

that issues not raised in appellant's briefs are waived, this Court has refused to review the improperly presented claim. *Beck* v. *Washington,* 369 U.S. 541, 549-553 (1962); *Lawn* v. *United States,* 355 U.S. 339, 362-3, n.16 (1957)

Additionally, petitioner's arguments that the due process and equal protection clause of the Fourteenth Amendment provide a right to counsel distinct and separate from the Sixth Amendment right were not raised by him in the Petition for Writ of Certiorari. In that petition, only two issues were raised: the application of the Sixth Amendment right to counsel to defendants charged with offenses punishable by imprisonment (Pet. for Cert., 9-12) and the validity of the predictive evaluation technique mandated by *Argersinger* (Pet. for Cert., 12-14). This Court granted certiorari on a petition which tendered only those questions. Contrary to the Supreme Court Rules, however, petitioner now attempts to present additional questions for this Court's consideration. Supreme Court Rule 23(1)(c); Supreme Court Rule 40(1)(d)(2). Respondent submits that the additional questions presented are not properly before this Court and should not be considered. *Irvine* v. *California,* 347 U.S. 128, 129 (1954); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 428-9 (1963); *Neely* v. *Eby Construction Co.,* 386 U.S. 317, 330 (1966); *Dorszynski* v. *United States,* 418 U.S. 428, 431 n.7 (1974).

B.

Due Process Does Not Require Appointment Of Counsel For Non-Felony Cases Where No Imprisonment Is Imposed.

The Sixth Amendment enumerates a specific right to counsel which applies in criminal proceedings. This right is made applicable to the states through the Fourteenth Amendment; in that context, due process of law of the Fourteenth Amendment acts as a conduit for the Sixth

Amendment right to be applied to the states. Petitioner argues that the Due Process Clause of the Fourteenth Amendment provides a right to counsel which is distinct and separate from the Sixth Amendment right. He cites no authority, however, for this proposition: indeed, there is no support for it either in the Constitution or in the precedents of this Court. To contend that the right to counsel in criminal proceedings exists in the Fourtenth Amendment independently of what is provided in the Sixth Amendment is to disregard precedent and to make the Constitution redundant. Thus, the question of whether there is a federal constitutional right to counsel at the state level in non-felony cases not punished by imprisonment must be evaluated in the context of Sixth Amendment concerns.

The requirements of due process are, of course, applicable to both criminal and civil proceedings. In the criminal context, the question of due process involves determination of whether fair procedure requires assistance of counsel. Application of the due process analysis in the criminal context is illustrated by this Court's decision in *Ross* v. *Moffitt, supra,* where the Court examined the state practice of not appointing counsel for indigents in discretionary appeals to determine if such procedure was consistent with the requirements of fair procedure guaranteed by the Due Process Clause. The Court found that counsel was not required because individuals could obtain a fair discretionary appeal without an attorney.

Similar analysis in the context of trial court proceedings in non-felony cases shows that individuals can obtain a fair trial without an attorney. The simple nature of the issues, the *de minimus* nature of the sanctions once imprisonment is removed as a possibility, and the relaxing of the adversarial process combine to permit an individual to make a defense and obtain a fair hearing without an attorney.

The instant case illustrates the reliability and fairness of a trial without an attorney. This is a simple case, presenting a very simple issue. The trial court was not faced with complex or difficult issues, but rather with a case in which the issue was one of credibility of witnesses. The testimony at the trial required that the judge believe either that petitioner was apprehended outside the store with a briefcase which he had not paid for (as the store detective testified) or that petitioner was still in the store looking for the salesgirl when he was stopped (as petitioner testified). Addition of an attorney may have added greater detail to the description of what the store detective observed (if the attorney had cross-examined the detective) but basically, there was no complex defense which needed presentation, nor special theory of defense which needed elaboration and development. It was a completely straightforward case to which the addition of a lawyer perhaps may have added cohesion and eloquence. That there was no defense lawyer, however, did not detract from the reliability of the proceedings.

Analysis of the instant facts by application of the standards set forth by Mr. Justice Powell in *Argersinger* v. *Hamlin*, 407 U.S. 64 confirms the conclusion that due process did not require appointment of counsel in this case. Mr. Justice Powell suggested that relevant factors to be considered included the complexity of the offense charged, the probable sentence which will result upon conviction, and individual factors peculiar to each case. This case was neither complex, nor was petitioner incompetent to present it. Petitioner admits both that there was nothing unusually difficult in this case and that he was not incompetent to present it (Pet. Br. 64). Nor does the sentence imposed require a different result: the actual penalty imposed was a small $50.00 fine which was paid immediately out of petitioner's bond. No additional factors have been suggested which would require appointment of counsel in this case. Indeed, the unfortunate lack of moral condemnation by society for offenses such as shoplifting supports the conclusion that due process did not require that petitioner have counsel appointed for him for this trial.

Finally, if by analogy this Court wishes to consider the right to appointed counsel according to the standards of the civil due process cases, the result of such analysis leads to the same conclusion. The purpose of the approaches adopted in the civil due process cases is to insure fairness in proceedings between the State and individuals. To do so, the Court has found it necessary to consider and balance three distinct factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal administrative burdens that the additional or substitute procedural requirements would entail." *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

In applying these factors to the instant case it is clear that an individual has a significant interest in not being convicted when he is not guilty. However, the procedures involved in a criminal trial provide various safeguards: witnesses must testify against defendant, the defendant is presumed innocent and must be proven guilty beyond a reasonable doubt. The addition of a lawyer to these safeguards will not significantly add to the fairness and reliabilty of the proceedings. (See *supra*, pp 22-23). In light of the fact that the probable value of the proposed additional safeguard is minimal, while the costs which it would impose on society and on defendants who are presently entitled to

counsel under the Sixth Amendment are high (see *supra*, pp. 25-37), the conclusion is inevitable—whether under the tests of civil due process or criminal due process—that appointment of an attorney was not required in petitioner's shoplifting trial and is not required in non-felony trials which do not lead to imprisonment.

CONCLUSION

For the foregoing reasons respondent respectfully requests that the judgment and opinion of the Supreme Court of Illinois affirming the conviction of petitioner by the Circuit Court of Cook County, Illinois be affirmed.

Respectfully submitted,

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APPENDIX A

State	Offenses to which right to appointed counsel applies	Statute or Rule	State Court Decision	Comments
Alabama	Any criminal proceeding in which representation by counsel constitutionally required.	Ala. Code, Title 15 § 15-12-1, § 15-12-20 (1975)		
Alaska	Any offense punishable by incarceration; or which may result in loss of liberty or a heavy fine.	Alaska Stat. § 18.85.100(a) (1974); Alaska Const., art. 1, § 11		"Authorized imprisonment" standard.*

* "Authorized Imprisonment" is used to describe statutory schemes which require appointment of counsel wherever imprisonment is an authorized penalty.

Arizona	Any criminal proceedings which may result in punishment by loss of liberty; or where the court concludes that the interest of justice so requires.	Ariz. R. Crim. P. Rule 6.1(b) (Supp. 1977)	*Burrage* v. *Superior Court*, 105 Ariz. 53, 459 P. 2d 313 (1969)	Court in *Burrage* held that appointment of counsel required in all cases punishable by more than 6 months imprisonment and/or $500 fine, and may be provided if complexity of case requires it.
Arkansas	All criminal offenses except in misdemeanor cases where court determines that under no circumstances will conviction result in imprisonment.	Ark. R. Crim. P. Rule 8.2 (1977)	*Alexander* v. *State*, 527 S.W. 927 (Supr. Ct., 1975)	"Imprisonment-in-fact" standard.**

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** Imprisonment-in-fact" is used to describe statutory schemes which, in accord with *Argersinger*, prohibit imposition of imprisonment unless counsel is appointed.

California	All felonies and misdemeanors.	Cal. Const., art. 1, § 13; Cal. Penal Code; § 987 (Supp. 1977)		"Authorized imprisonment" standard.
Colorado	All misdemeanors; also municipal code violations at discretion of public defender.	Col. Rev. Stat. Ann. § 21-1-103 (1974)		No provision made for appointment of counsel for "petty offenses" (punishable by up to 6 months imprisonment) other than municipal code violations.
Connecticut	In all criminal actions, including motor vehicle actions, punishable by confinement for more than 30 days.	Conn. Gen. Stat. Ann. § 51-296 (Supp. 1978); § 845A of Practice Book of Criminal Procedure in the Circuit Court		

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Delaware	In every case which the law requires or where court deems it appropriate.	**Del. Code, Title** 11, § 5103 (1975); Superior Court Crim. R. 44(a) (Supp. 1977)	*Lindh* v. *O'Hara* 325 A. 2d 84 (Del. Supr. Ct. 1974)	"Imprisonment - in - fact" standard.
Florida	Any misdemeanor or municipal ordinance violation unless prior written statement by judge that conviction will not result in imprisonment.	Fla. R. Crim. P., 3.111(b) (1975)	*Rollins* v. *State,* 299 So. 2d 586 (1974)	"Imprisonment - in - fact" standard.
Georgia	Any violation of a state law or local ordinance which may result in incarceration.	Ga. Code Ann., § 27-3203 (1978)	*Johnston* v. *State,* 236 Ga. 370, 223 S.E. 2d 808 (1976)	"Imprisonment - in - fact" standard.

Hawaii	For any offense punishable by imprisonment for more than sixty days or where offense punishable by confinement in jail.	Haw. Const., Art. 1, § 13; Haw. Rev. Stat., Title 37, § 802-1 (1976)		
Idaho	For offenses punishable by confinement of more than six months or fine of more than $300.	Idaho Code Ann., Title 19, § 851 (1978)	*Mahler* v. *Birnbaum,* 95 Idaho 14, 501 P. 2d 282 (1972)	"Imprisonment - in - fact" standard.
Indiana	All criminal prosecutions.	Ind. Const., Art. I, § 13	*Bolkovac* v. *State of Indiana,* 229 Ind. 294, 98 N.E. 2d 250 (1951)	
Iowa	For misdemeanors punishable by imprisonment of more than 30 days or a fine of $100.00; or where defendant faces possibility of actual imprisonment.		Iowa Code Ann., § 813.2, Rule 2 § 3; § 813.3, Rule 42 § 3 (1978 Spec. Pamphlet)	"Imprisonment - in - fact" standard.

Kansas	For all felonies or where imprisonment actually imposed.	Kan. Gen. Stat., § 22-4503 (1974)	*State* v. *Giddings*, 216 Kan. 14, 531 P. 2d 445 (1975)	Although statutory provisions require appointment of counsel for felonies only, caselaw adopts "imprisonment-in-fact" standard.
Kentucky	Offenses punishable by a fine of more than $500 or by confinement.	Ky. Rev. Stat., R. Cr. 8.04 (1978)	*Jenkins* v. *Commonwealth*, 491 S.W. 2d 636 (1973)	
Louisiana	Offenses punishable by imprisonment.	L.S.A.C. Crim. Pr., Art. 513 (Supp. 1978)	*State* v. *Coody*, 275 S. 2d 773 (Supr. Ct. 1973)	

Maine	Any offense punishable by imprisonment for one year or more; where authorized imprisonment is less than one year, the court may assign counsel (but, see Comment).	Maine R. Crim. P. 44, 14 M.R.S.A. (Supp. 1978); 17-A M.R.S.A. § 4-A (3)(E) (Supp. 1978)	*Newell* v. *State*, 277 A. 2d 731 (Maine, 1971)	"Imprisonment-in-fact" standard, although the relevant statutes provide the standard given; *Newell*, however, provides that counsel shall be appointed for offenses where penalty is greater than six months and/or $500.
Maryland	Any criminal proceeding punishable by more than three months confinement or more than $500 fine; or where complexity of the case or characteristics of the accused require counsel; or where constitutionally required.	Md. Ann. Code, art. 27A, § 2(h), § 4 (1976)		"Imprisonment-in-fact" standard.

Massachusetts	Any crime for which sentence of imprisonment may be imposed.	Mass. Supr. Jud. Ct. Gen. R. 3, 10	*MacDonnel* v. *Commonwealth*, 230 N.E. 2d 821 (1971)	*MacDonnell* required right to counsel based upon Rule 3.10 rather than constitutional grounds.
Michigan	Any offense for which imprisonment is imposed.		*People* v. *Studebaker*, 387 Mich. 698, 199 N.W. 2d 177 (July 26, 1972)	"Imprisonment-in-fact" standard.
Minnesota	Any misdemeanor for which a sentence of more than 90 days imprisonment or $500 fine may be imposed.	Minn. Stat. Ann. § 609.02, § 611.07 (Supp. 1977)		"Imprisonment-in-fact" standard.
Mississippi	Any offense punishable by incarceration for 90 days or more.	Miss. Code Ann. § 99-15-15 (1972)	*Nelson* v. *Tullos*, 323 So. 2d 539 (Supr. Ct. 1975)	"Imprisonment-in-fact" standard.

Missouri	Statutory provision for felonies only: Attorney General Opinion No. 207, Young 6-21-63, however, states that counsel should be appointed in misdemeanor cases of "more than minor significance" and "where prejudice might result."	Mo. Ann. Stat., § 545.820 (1953); Mo. Ann. Rules, Crim. Pro. L. 29.01 (1975)	*State ex rel. Kansas City* v. *Meyers*, 513 S.W. 2d 414 (Supr. Ct. 1974)	
Montana	For misdemeanors the court "in the interest of justice" may assign counsel.	Mont Rev. Codes Ann. § 95-1001 (1969)		
Nebraska	In felonies or in any case where imprisonment imposed.	S. 29-1804.06, R.S. Supp. 1972	*Kovarik* v. *County of Banner*, 224 N.W. 2d 761 (Supr. Ct. 1975)	Although statutory provision for felonies only, *Kovarik* recognizes "Imprisonment-in-fact" standard.

Nevada	Any "public offense" where court determines representation required.	Nev. Rev. Stat., § 171.188 (1973)		Statutes do not define "public offense."
New Hampshire	All offenses punishable by imprisonment.	N.H. Rev. Stat. Ann. § 604-A:2, § 625:9 (1974)		"Imprisonment-in-law" standard.
New Jersey	By statute in any offense which is indictable.	N.J. Stat. Ann. § 2A:158(A) (Supp. 1973); N.J. Crim. Rules 3:27-1 (1973)	*Rodriguez* v. *Rosenblatt*, 58 N.J. 281, 277 A. 2d 216 (1971); *State* v. *McGrew*, 127 N.J. Super. 327, 317 A. 2d 390 (1974)	In *Rodriguez* court held counsel should be assigned where imprisonment actually imposed or where other consequences of magnitude actually threatened. In *McGrew*, (appellate) court notes rule of *Rodriguez* is not of constitutional dimension but rather a kind of policy ruling.

New Mexico	Any offense that carries a possible sentence of imprisonment.	N.Mex. Stat. Ann., § 41-22A-12 (Supp. 1975)		"Imprisonment-in-fact" standard.
New York	Any offenses except traffic infractions.	C.P.L. § 170.10 (1971)		
North Carolina	Any case in which "imprisonment, or a fine of $500.00 or more" is likely to be adjudged.	N.C. Gen. Stat., § 7A-451 (Supp. 1975)		
North Dakota	All non-felony cases unless magistrate determines that sentence upon conviction will not include imprisonment.	N.D. Cent. Code R. Cr. Pr., Rule 44 (1974)	*State* v. *Heasley*, 180 N.E. 2d 242 (1970)	In *Heasley*, county judge authorized to appoint counsel in misdemeanor cases. Rule 44 enacted 'imprisonment-in-fact" standard.
Ohio	Offenses punishable by less than six months imprisonment unless no confinement imposed.	Ohio R. Crim. P., Rule 2, Rule 44(A)(B), (1975)		"Imprisonment-in-fact" standard.

Oklahoma	In all criminal cases.	Okla, Stat. Ann. 22-464, 1271 (1969)	*Stewart* v. *State*, 495 P. 2d 834 (Crim. App. 1972)	
Oregon	In all criminal cases.		*Brown* v. *Multnomah County Distr. Ct.*, 29 Or. App. 917, 566 P. 2d 522 (1977)	
Pennsylvania	In all misdemeanors and felonies; in other cases where there is "a likelihood that imprisonment will be imposed."	Pa. R. Cr. P. 316(a)-(c) (supp. 1978)		"Imprisonment-in-fact" standard for "summary cases"; see Comment to Rule 316 indicating intent of rule to implement *Argersinger*.

Rhode Island	Offenses punishable by imprisonment of more than 6 months and/or fines over $500.	Supr. R. Cr. Pr. 44; R. Cr. P. 44 (1976)	*State* v. *Halliday*, 280 A. 2d 333 (Supr. Ct. 1971)	Note to Cr. R. 44, indicates intent of Rule to implement *Halliday* which held that appointed counsel required in all cases punishable by more than six months imprisonment or $500 fine.
South Carolina	Code provides for counsel wherever guaranteed by the Constitution.	S.C. Code § 17-3-10 (1977)		
South Dakota	In any criminal action.	S.D. Comp. Laws Ann. § 23-2-1 (Supp. 1977)	*In re Wright*, 86 S.D. 589, 199 N.W. 2d 599 (1972), reversing 85 S.D. 669, 189 N.W. 2d 447 (1971) (remand for reconsideration in light of *Argersinger*)	In *Wright*, the court granted petitioner relief from his sentence of 30 days imprisonment stemming from an uncounseled conviction.

Tennessee	Every person accused of any crime or misdemeanor whatsoever.	Tenn. Code, Ann. § 40-2002-3 (1975)		Tenn. Code Ann. § 40-2017 provides for appointment of public defender or appointed attorney in all felony cases only.
Texas	Any felony or misdemeanor punishable by imprisonment.	Tex. Code Cr. Pr. Art 26.04 (1965)	*Aldrighetti* v. *State*, 507 S.W. 2d 770 (Crim. App.) (1974); *Trevino* v. *State*, 555 S.W. 2d 750 (Crim. App. 1977)	Neither statute or case-law makes clear if standard is "authorized imprisonment" or "Imprisonment-in-fact"; cases cited involve situations where jail time actually imposed.
Utah	Any crime in which penalty of more than six months imprisonment could be imposed.	Utah Code Ann., § 77-64-2 (Supp. 1977)	*Salt Lake City Corp.* v. *Salt Lake County*, 520 P. 2d 211 (Supr. Ct. 1974	

Vermont	Any misdemeanor punishable by any period of imprisonment or fine over $1000 unless prior determination that imprisonment or fine over $1000 will not be imposed.	Ver. Stat. Ann., § 13-5201 - 5231 (1974)		"Imprisonment - in - fact" standard.
Virginia	Misdemeanors, the penalty for which may be confinement in jail.	Va. Code Ann., § 19.2-157, 160 (Supp. 1978)	*Whorley* v. *Commonwealth*, 214 S.E. 2d 447 (Supr. Ct. 1975)	
Washington	All [illegible]nal offenses punish[illegible]by loss of liberty.	J. Cr. R. 2.11(a)(1)	*McInturf* v. *Horton*, 540 P. 2d 421 (Supr. Ct. 1975)	"Authorized imprisonment" standard.

West Virginia	All misdemeanor cases.	W.Va. Code Ann., § 62-3-1(a) (1977)		
Wisconsin	In all criminal prosecutions.	Const., Art. I, § 7	*State ex rel. Winnie Harris*, 75 Wisc. 2nd 547, 249 N.W. 2d 791 (1977)	"Authorized imprisonment" standard.
Wyoming	In all criminal cases wherein accused shall or may be punished by imprisonment in the penitentiary.	Wyo. Stat. Ann., § 7-9-105 (1977)		